

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STANLEY R. WHEELER

Claimant

VS.

HBD INDUSTRIES, INC.

Respondent

AND

NEW HAMPSHIRE INS. CO.

Insurance Carrier

Docket No. 1,054,924

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 5, 2011, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Mitchell D. Wulfekoetter, of Topeka, Kansas, appeared for claimant. Jon E. Newman, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant met with personal injury by accident that arose out of and in the course of his employment and that his current need for medical treatment is causally related to that accident.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 26, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends claimant did not suffer personal injury by accident that arose out of and in the course of his employment on July 8, 2010. Specifically, respondent argues that claimant's current symptoms and need for treatment are not causally related to his alleged work accident but, instead, are related to other preexisting or non-occupational causes. Respondent further argues that the ALJ exceeded his jurisdiction in admitting the independent medical report of Dr. John Pazell, claiming the report was not

provided to respondent within 15 days as provided by K.S.A. 44-515. In the event the Board finds the admission of the report permissible under K.S.A. 44-515, respondent contends Dr. Pazell's report should be disregarded because he relied on claimant's history of the mechanism of the accident, which was not credible or accurate. Respondent next argues that the ALJ exceeded his jurisdiction in appointing Dr. Gery Hsu as the authorized treating physician without giving respondent the opportunity to provide claimant with a list of three physicians out of which claimant could choose one as his treating physician.

Claimant asserts he sustained injuries in a work-related accident on July 8, 2010, and that his current need for medical treatment was a consequence of that accident. Concerning the admission of Dr. Pazell's report, claimant contends the Board does not have jurisdiction of that issue. In the event the Board finds it has jurisdiction, claimant asserts that respondent failed to preserve the argument for appeal pursuant to the contemporaneous objection rule; the amendments to K.S.A. 44-515 struck down the 15-day period and replaced it with "reasonable amount of time," a procedural change; and respondent failed to trigger the time period in K.S.A. 44-515 as its initial demand for records was vague and did not identify a specific medical examination.

The issues for the Board's review are:

(1) Did the ALJ exceed his jurisdiction in admitting the medical report of Dr. John Pazell?

(2) Did the ALJ exceed his jurisdiction in appointing Dr. Hsu as claimant's authorized treating physician without giving respondent the opportunity to submit a list of three physicians to claimant?

(3) Did claimant have a work-related accident on July 8, 2010? If so, is his current need for medical treatment a consequence of that accident?

FINDINGS OF FACT

Claimant worked for respondent in the receiving department. On July 8, 2010, he was pushing a cart down an inclined hallway when the cart hit some loose, broken concrete or gravel and came to an abrupt stop. Claimant said the cart tipped over and he flew over the top of it, landing with his right hip on the floor and his left side against a wall. After the accident, claimant noticed he had torn his pants and had a laceration on his right knee. He reported the incident to his immediate supervisor and was taken to see James Robertson, respondent's purchasing and production manager. Claimant filled out an incident report wherein he stated that he suffered a "scrap[e] & bruise on [his] right knee."¹ He wrote that he was pushing a cart downhill when the cart stopped abruptly and spilled

¹ P.H. Trans., Resp. Ex. 4 at 1.

and he ran into the back of the cart. Claimant finished out his shift and did not see a doctor.

Claimant stated that when he reported the incident, he was sore but mostly concerned with the laceration on his knee because he suffered from cellulitis and had been told by his physician that lacerations could turn into cellulitis.

Claimant testified that the next day "it [the right knee] was sore and still it was very red."² He again spoke with Mr. Robertson and filled out an accident report in which he stated the material cart stopped at the bottom of a ramp and tipped over, causing him to have an abrasion and contusion on his right leg. An appointment was made with Dr. Martin Dillow for that day. Claimant expressed to Dr. Dillow his concern that his right knee was swollen. He went back to Dr. Dillow on July 13, 2010. At that time, claimant complained that his lower leg had gotten red and infected, his leg was hot, and he was running a fever. He was diagnosed with cellulitis in his right lower leg. He was treated for the cellulitis and said it took from two to three weeks to get it under control. Claimant said he would periodically have pain in his right hip after the July 8 accident, but it was not bad—just sore. He said he mentioned the pain to Dr. Dillow, but Dr. Dillow thought it may have been from his favoring his leg as a result of the cellulitis.

On July 29, 2010, claimant began to have severe pain that started in his right hip and upper buttocks and went down his leg. On July 30 claimant went to the emergency room. He was given medication and released. The medication did not help, and claimant was sent to physical therapy, which helped temporarily but not in the long term. Dr. Dillow sent him for nerve conduction testing, which returned as abnormal with suggestions of lumbosacral radiculopathy. Claimant was then sent for an MRI, which showed he had severe spinal stenosis at L3-4, and although not as severe as L3-4, multilevel disease at other levels, L2-3, L4-5, and L5-S1. Dr. Dillow then referred claimant to Dr. Hsu. Dr. Hsu gave claimant three epidural injections, but he recommended surgery.

Claimant last saw Dr. Dillow on January 14, 2011. He was still having some symptoms in his buttocks, hip and legs but the everyday symptoms had gotten better shortly after this third injection. He was released from treatment by Dr. Dillow at that time. But his symptoms started getting worse again and occurred more often. He contacted respondent's insurance carrier about treatment but received a letter from the carrier indicating his condition was no longer considered to be covered by or compensable under workers compensation.

Respondent entered exhibits showing that claimant had injuries to his lumbar back in 1979 and 1985. Claimant admitted he had some prior chiropractic treatment to his low back before 2010. In 1998, a pre-employment x-ray of claimant's back showed he had

² P.H. Trans. at 12.

some narrowing in some of his lumbar vertebrae. Another x-ray taken in 2008, taken when claimant went to the emergency room for an abdominal problem, showed he had severe degenerative changes in his lumbar spine. In March 2010, claimant underwent surgery on his right knee. He was released from treatment in May 2010. Claimant testified he was not having pain in his right knee after his rehabilitation after surgery. He said he now has a tingling sensation in his right leg and hip area. And he still experiences deep pain in his hip and buttocks from time to time.

James Robertson, respondent's purchasing and production manager, testified that he is claimant's supervisor. He spoke with claimant on July 8, 2010, after claimant's accident, and they filled out an incident report. When claimant first came to Mr. Robertson, he told him he had bumped his knee on a material cart. He said claimant did not say he had fallen over the cart or that he went over the cart with his feet leaving the ground. It was Mr. Robertson's understanding that the cart stopped at the bottom of the ramp and claimant bumped his knee on the cart. Claimant did not ask him for medical treatment.

Mr. Robertson spoke with claimant again the next day, July 9, when claimant filled out an accident report. Again, claimant did not mention falling over the cart. After the conversation on July 9, Mr. Robertson was still under the impression that the cart had stopped and claimant bumped his knee on it, causing a laceration and some bruising. Claimant did not complain to Mr. Robertson even subsequent to July 9 and, in fact, has been back doing his regular job.

Dr. Paul Stein evaluated claimant on May 9, 2011, at the request of respondent. Claimant gave him a history that he was pushing a cart that stopped abruptly and fell over, and that he fell over the cart, sustaining a knee abrasion. Claimant told Dr. Stein about his treatment for cellulitis and that he had pain in his right hip and leg. Claimant complained of discomfort on the right side of the low back at the level of the belt line and intermittent numbness and tingling in the right lower extremity. Claimant said he still has intermittent pain in his right knee but that the knee is pretty much back to its pre-accident status.

After reviewing claimant's medical records and performing a physical examination, Dr. Stein opined that he was at maximum medical improvement as related to the right knee and that there was no permanent injury or alteration of the status of the right knee due to the July 8, 2010, incident. In regard to claimant's cellulitis, Dr. Stein concluded that his subsequent cellulitis was causally related to the work incident of July 8. However, the symptomatology had resolved and Dr. Stein could find no permanent partial impairment of function to the right lower extremity from the cellulitis from the work injury.

Dr. Stein noted that there were no complaints of low back pain in claimant's contemporaneous medical records. He also noted that claimant had preexisting lumbar stenosis and EMG changes of nerve damage which could have arisen from the low back. He opined that to the extent the findings are radicular, they are likely related to claimant's stenosis but not necessarily to the work incident. Dr. Stein stated that there is no evidence

of a low back or lumbar spine injury and no documentation of any permanent impairment of function to the low back as a result of the July 8, 2010, incident.

Dr. John Pazell examined claimant on June 30, 2011, at the request of claimant's attorney. Claimant told Dr. Pazell he was pushing a cart down a 45-degree incline when the cart hit the bottom of the incline and flipped over, and he went over the top of the cart, landing on his right side. Claimant told him he had a laceration on his right knee and about his history of cellulitis. Claimant also said that he complained of hip pain and leg tingling all along but that everyone was focused on his knee. On July 30, 2010, he went to the emergency room complaining of right hip and leg pain.

After examining claimant, Dr. Pazell diagnosed him with a herniated intervertebral disc at L3-4. He opined the direct and proximate cause of the problem was the fact that claimant flipped over a cart at work. Dr. Pazell recommended that claimant have further treatment with Dr. Hsu, a neurosurgeon.

At the preliminary hearing, before testimony was taken, respondent's attorney objected to the potential admission of Dr. Pazell's report as an exhibit, stating:

. . . I need to raise the issue of KSA 44-515 in regards to the claimant's IME report of Dr. Pazell. I don't know what evidence we'll need to enter on that, but it's just a technical argument wherein we were provided the report in excess of 15 days from the date of the exam, so we would object to its consideration and introduction herein. . . .³

Respondent's attorney stated that Dr. Pazell's independent medical examination of claimant was performed on June 30, 2011, and the report was not received by respondent until July 21, 2011, 21 days later. The ALJ overruled respondent attorney's objection.

During claimant's testimony, claimant's attorney asked that Claimant's Exhibit 1, which contained Dr. Pazell's report, be marked and entered as an exhibit. At that time, respondent's attorney stated, "I have no objection."⁴ Later, after testimony was taken and during argument by the parties' attorneys, respondent's attorney stated: "Your Honor, we would submit that Dr. Pazell's report is not admissible pursuant to KSA 44-515, which we discussed at the inception of this hearing."⁵

³ P.H. Trans. at 5.

⁴ P.H. Trans. at 14.

⁵ P.H. Trans. at 61.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁶ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁷

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁸

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁹ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹⁰ An injury is not compensable, however, where the worsening

⁶ K.S.A. 2010 Supp. 44-501(a).

⁷ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁸ *Id.* at 278.

⁹ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹⁰ *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹¹

K.S.A. 44-515 states in part:

(a) After an employee sustains an injury, the employee shall, upon request of the employer, submit to an examination at any reasonable time and place by any one or more reputable health care providers, selected by the employer, and shall so submit to an examination thereafter at intervals during the pendency of such employee's claim for compensation, upon the request of the employer . . . Any employee so submitting to an examination or such employee's authorized representative shall upon request be entitled to receive and shall have delivered to such employee a copy of the health care provider's report of such examination within 15 days after such examination, which report shall be identical to the report submitted to the employer.

. . . .
(c) Unless a report is furnished as provided in subsection (a) and unless there is a reasonable opportunity thereafter for the health care providers selected by the employee to participate in the examination in the presence of the health care providers selected by the employer, the health care providers selected by the employer or employee shall not be permitted afterwards to give evidence of the condition of the employee at the time such examination was made.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹³

ANALYSIS

Respondent argues the ALJ exceeded his jurisdiction in admitting the report of Dr. Pazell into evidence at the preliminary hearing. Before this Board Member can consider the merits of respondent's appeal regarding the admissibility of evidence, it must first consider whether it has jurisdiction to review this preliminary hearing finding.

The Board has limited authority and jurisdiction when reviewing findings from preliminary hearings. The disputed issue must be one of those specifically set forth in

¹¹ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

¹² K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

¹³ K.S.A. 2010 Supp. 44-555c(k).

K.S.A. 44-534a or the ALJ must have exceeded his jurisdiction as required by K.S.A. 44-551. The jurisdictional issues listed in K.S.A. 44-534a are: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; or (4) whether certain defenses apply.

Because the evidentiary issue now before the Board is not one listed in the preliminary hearing statute, the question becomes whether the ALJ exceeded his jurisdiction.

As with other evidentiary questions at preliminary hearing, the ALJ is charged with the responsibility of determining whether the evidence proffered has sufficient reliability, relevance and foundation to be considered, knowing that the hearing is summary in nature. This Board Member finds an administrative law judge has the authority at a preliminary hearing to determine whether claimant has properly followed the statutory procedures and met all the foundation requirements for a medical expert's opinions to be admitted into evidence.

This Board Member finds the ALJ neither abused his discretion nor acted outside the scope of his jurisdiction. Therefore, the Board does not have jurisdiction to review the ALJ's preliminary hearing finding regarding the admission of the medical report into evidence. And because the ALJ considered the opinions expressed by Dr. Pazell in his report, it will be considered as part of the record for purposes of this review of the ALJ's preliminary determination that claimant met his burden of proving he suffered personal injury to his back and hip in addition to his right leg in the accident at work on July 8, 2010.

Respondent also alleges the ALJ exceeded his jurisdiction in authorizing Dr. Hsu to be claimant's authorized treating physician. The Board has ruled in the past and continues to hold that this is not a jurisdictional issue subject to review on an appeal from a preliminary hearing Order.¹⁴ Whether the ALJ must, in a given set of circumstances, authorize treatment from a list of three physicians designated by respondent is not a question which goes to the jurisdiction of the ALJ. An ALJ has the jurisdiction to decide this question.

This Board Member finds nothing to suggest the ALJ exceeded his jurisdiction in making his decision. ALJ's must routinely determine the most appropriate method of treatment in order to satisfy the Act's goal of curing and relieving the effects of the injury.¹⁵

¹⁴See *Beck v. U.S.D.* 475, No. 1,039,614, 2010 WL 2242752 (Kan. WCAB May 25, 2010); *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997); *Graham v. Rubbermaid Specialty Products*, No. 219, 395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

¹⁵K.S.A. 44-510h(a).

Selecting one treatment provider over another does not equate to a decision that exceeds the ALJ's authority. Rather, as is contemplated under K.S.A. 44-534a, the ALJ determined an issue regarding the furnishing of medical treatment. Whether claimant is in need of medical treatment is also an issue the Board does not have jurisdiction to review on an appeal from a preliminary hearing order. Accordingly, the Board is without jurisdiction to review the ALJ's order for medical treatment with Dr. Hsu.

In its application for review and brief to the Board, respondent states the issue as "[w]hether claimant suffered personal injury by accident arising out of and in the course of employment on the date alleged." However, respondent appears to admit that claimant had an accident at work on July 8, 2010, while pushing a cart and, as a result, sustained an injury to his right leg. What respondent is contesting is claimant's allegation that he also injured his low back and hips in that accident.

In support of its contention that claimant's injuries were exclusively to his right leg, respondent points to the initial description of the accident which claimant gave to his supervisor, Mr. Robertson, together with the treatment records of the initial treating physician, Dr. Dillow, where claimant made no mention of a back injury or symptoms, and the fact that claimant had preexisting medical conditions which arguably explain claimant's current problems. Respondent also contends that claimant is not credible because his description of the accident changed over time just as he initially denied having prior back problems until he was confronted with the records of prior accidents and claims of injuries to his low back. Claimant also had a preexisting condition in his right knee for which he underwent surgery in March 2010. Claimant denied having any back problems at his CDL examination on September 27, 2010.

This Board Member finds the opinions of Dr. Stein to be more persuasive than those of Dr. Pazell in this case. This is primarily due to the flawed history given to Dr. Pazell. Dr. Pazell based his opinion upon a belief that claimant suffered a more forceful and traumatic accident than what was related to Drs. Dillow and Stein and certainly more than what was described to Mr. Robertson on the day the accident occurred and on the next day as well. In addition, Dr. Pazell was told that claimant experienced buttock, hip and back pain from the outset. It is more probable that those symptoms began on or about July 30, 2010, when claimant presented at the emergency room of the Neosho Memorial Regional Medical Center.

CONCLUSION

(1) and (2) On appeal from a preliminary hearing, the Board is without jurisdiction to review an ALJ's evidentiary rulings and determinations concerning whether claimant is in need of medical treatment and which physician should provide treatment. Those issues are dismissed.

(3) Claimant has met his burden of proving he sustained injury by an accident at work on July 8, 2010, that arose out of and in the course of his employment with respondent. Based on the record presented to date, claimant has proven he suffered injuries to his right leg. Claimant has failed to prove, however, that he also injured his low back and/or hips in that accident and that his current symptoms and need for treatment are causally connected to his work-related accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated August 5, 2011, is modified to find claimant's work-related injuries are to his right leg only. Claimant is not entitled to an order for authorized medical treatment for his back, spine and/or hips.

IT IS SO ORDERED.

Dated this _____ day of October, 2011.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Mitchell D. Wulfekoetter, Attorney for Claimant
Jon E. Newman, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge